vss

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1048 OF 2003

Shri Gajanan Shivram Karve ... Appellant

V/s.

The State of Maharashtra ... Respondent

Ms.Ameeta Kuttikrishna with N.P. Pradhan and S.D. Khot for the Appellant.

Mrs.V.R. Bhosale, APP, for Respondent

CORAM: **V.G. PALSHIKAR & SMT.NISHITA MHATRE, JJ.**

DATED: **DECEMBER 4, 2006**

ORAL JUDGMENT (PER SMT.MHATRE, J.):

. The accused appellant has challenged the conviction and sentence imposed upon him under section 302 of the Indian Penal Code by the Sessions Court, Bombay in S.C. Case No.707 of 2001. The case of the prosecution is that the accused and the victim were friendly with each other. About 4 or 5 months prior to the incident, the prosecution claims that the accused had thrown some eggs on the victim. On 4.2.2001, at about 7 pm, the victim found the accused standing by the Saibaba Mandir. The victim purchased an egg from a shop closeby and threw it on the face of the accused. The accused left the place while the victim remained

standing near the Saibaba temple. Soon thereafter, the accused came to the spot where the victim was standing holding a kerosene bottle. The accused splattered the contents of the bottle on to the victim and then set him on fire. Hearing his shouts, his brother, Chandrakant came to the spot and extinguished the fire by dousing the victim with water. The accused was arrested and tried by the Sessions Court for having committed murder of the victim.

2. With the assistance of Ms.Kuttikrishna, learned Advocate for the appellant and the learned Assistant Public Prosecutor, we have scrutinised the entire evidence on record. We have reappreciated the same and we find that we are unable to affirm the impugned judgment. The evidence led by the prosecution suffers from too many discrepancies and contradictions as will be seen hereafter. According to the prosecution, the victim’s statement recorded by the police officer has been treated as the First Information Report at Exhibit 28. The First Information Report discloses that it was lodged on 4.2.2001 at about 8.45pm. Significantly, no signature of the victim has been obtained on this statement. Nor is there any endorsement from the Doctor treating him at the K.E.M. hospital where he was admitted. However, it has been signed by the police

officer who recorded the statement. The victim has stated in his statement that on 4.2.2001, at about 7 pm he went near the Sai Mandir where the accused was already sitting. He bought an egg from the shop closeby and broke it on the head of the accused. This was because the accused had four or five months prior to that date similarly thrown eggs on the victim. The victim in fact told the accused the reason for his actions. The accused left the place while the victim continued at the spot. About half an hour later, the accused came to the spot against carrying a bottle of kerosene. The victim claims in his statement that the accused smeared his face with kerosene from the bottle due to which he felt a burning sensation and tried wiping off the kerosene from his eyes. The victim then states that the accused emptied the bottle of kerosene on his head and set him ablaze. His brother Chandrakant came to the spot when the victim shouted and extinguished the flames. He states that he was then admitted to hospital where he was under treatment. The victim then claims that he had suffered burns on his chest, stomach, head, hands and the right toe.

3. The prosecution claims that thereafter at about 10 pm another statement of the victim was recorded. This statement was recorded by the Special Executive

Magistrate according to the prosecution. The contents of the statement are no different from the statement recorded at Exhibit 28. The statement bears an endorsement of a Doctor which is marked as Exhibit 35. The Special Executive Magistrate who has been examined as PW16 has stated categorically that he received a phone call from Dadar police station at about 10 pm informing him that he was required at the KEM hospital to record a dying declaration. Accordingly, he went to the hospital and directed one of his subordinates to write the statement. The victim mentioned his name but he was not in a position to speak coherently according to PW16. In fact, this witness has stated that the injured had not stated anything in his presence, besides mentioning his name. This witness has been declared hostile. The endorsement on the statement at Exhibit 35 of the medical officer was made by PW14. This Doctor has stated that he was not treating the victim but had made the endorsement without consulting the Doctor, who was then treating the victim. He has stated that he has endorsed the dying declaration only because the police directed him to do so. With such evidence on record, in our opinion, it is impossible to accept the statements of the victim. The dying declaration which bears the Doctor’s endorsement at Exhibit 35 indicates that it was signed by the victim. However, the victim has stated

that his hands were burnt. Besides that the statement at Exhibit 28 which is considered as the FIR is not signed although it was recorded earlier in point of time. The Special Executive Magistrate has stated categorically that he did not record the statement as the victim was incoherent. In such circumstances, the dying declaration allegedly recorded by the Special Executive Magistrate cannot be said to have been proved. It would therefore, be necessary to consider whether the members of the victim's family, two of whom were eye witnesses, have been able to prove that the accused had set the victim ablaze.

4. PW3 is the wife of the victim. She has deposed that on 4.2.2001, she was cooking in their first floor residence. The accused came there with some liquid in a bottle, poured it on the victim and set him ablaze. She then says that her neighbour, one Gaikwad, doused the victim with water in order to extinguish the fire. She states that she questioned the accused about his behaviour when he replied that he had set her husband on fire because the victim had thrown an egg on him. The witness states that she had no knowledge about the contents of the bottle which were poured on the victim. This witness has stated that her son and daughter were with her and her husband in the house when the accused

set him on fire.

5. PW5 is the daughter of the deceased. She has stated that her father came to the ground floor to purchase fish. She then speaks about the accused having thrown some liquid on the face of the deceased and on his body and thereafter having set him ablaze. This witness has stated that the deceased questioned the accused about his actions. The accused had replied in her presence that he acted in this manner because the victim had thrown an egg on him. The witness then states that her mother PW3 came down from the first floor and questioned the accused. She has spoken about the neighbours extinguishing the fire after which her uncle rushed the victim to hospital. This witness states that she was in front of the ground floor. She saw the accused coming from a lane with some liquid in his hand. Therefore, according to this witness, the incident occurred on the ground floor and not on he first floor as deposed by PW3, her mother. It did not happen near the Saibaba Mandir as allegedly mentioned by the victim in his statement to the police.

6. PW9 who is the son of the deceased has also related the incident which according to him took place at about 7.30 pm. According to this witness his mother was

cooking. This witness has also spoken about his father having gone to purchase fish as stated by his sister in her deposition. He states that the fish was being sold in front of their house near the staircase at that point of time. His father had gone down the stairs from their house. The accused came there and poured some liquid on his father and set him ablaze. He has stated that he was unable to speak or shout when he saw his father ablaze. Instead, he went to call his uncle and aunt who arrived at the scene and admitted his father to hospital.

7. Considering the evidence of PW3, PW5 and PW9, the spot of the incident itself has not been established by the prosecution. There is an inconsistency in the evidence of these witnesses as to the exact spot at which the incident occurred. Furthermore, the victim whose statement has been treated as the F.I.R. has claimed that the incident occurred near the Sai Mandir. The categoric statement of PW3 that she witnessed the incident cannot be accepted if one is to believe that the incident occurred either near the Saibaba Mandir or near the fish vendor as claimed by the daughter or at the staircase as mentioned by the son. This is because PW3 according to the children was cooking in their house on the first floor at that point of time and therefore,

it is impossible that she could have witnessed the incident. The wife of the victim claims that one Gaikwad, her neighbour, extinguished the flames. However, the victim has allegedly stated that his brother arrived at the spot and then extinguished the flames. The prosecution has not bothered to examine Gaikwad, who PW3 has named nor has it examined any other neighbours of the victim.

8. The brother of the victim PW4 has stated that the victim's son informed him of the incident. He claims that when he reached the spot the victim told him that he was set ablaze by the accused because he had thrown an egg on him. This witness has contradicted himself in his cross-examination by stating that the victim disclosed to him the reason for being set ablaze while being taken to hospital in a taxi. This witness has admitted that the deceased and the accused were close friends and there was no dispute between them. PW6 is the sister of the victim. She has stated that she learnt of the incident from PW9. She was also present in the taxi with the victim. However, she has not stated that the victim related the reason for being set on fire in the taxi. PW7 is the nephew of the victim. He has deposed that he learnt about his uncle being set on fire by the accused. He went to the

victim's house and found the victim in front of the Saibaba Mandir with burn injuries. He claims that on asking, the victim informed him that he had sustained the burns on account of a quarrel between himself and the accused.

9. PW11 and PW12 are the panch witnesses. They have both stated that the spot panchanama was drawn in their presence. They were shown the clothes which allegedly belonged to the accused and which had been attached by the police. They were directed to sign a panchanama in respect of the clothes. Certain articles namely, a towel, one match box and a plastic bottle smelling of kerosene had already been attached by the police and the Panchanama had been prepared for the witnesses to sign.

10. In our view, therefore, the case of the prosecution is riddled with lacunae and there is no basis for drawing the inference that the accused is guilty. The postmortem report indicates that the victim died of Septicaemia about 10 days after he was admitted to hospital. The testimonies of the witnesses contain several contradictions and discrepancies. There are several glaring omissions in the depositions of the witnesses. The prosecution has not furnished any

explanation as to why Gaikwad, who PW3 claims extinguished the fire, was not examined. Nor is there any explanation as to why the person running the stall from which the victim bought an egg has not been examined. In our opinion, therefore, the prosecution has failed to establish the case against the accused. The offence has not been proved to the hilt and therefore, the accused is entitled to an acquittal.

11. Appeal allowed. Conviction and sentence passed by the Sessions Court is set aside. The appellant be set at liberty forthwith if not otherwise required in law.

.....